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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954

No. 603

MARION G. DENTON AND VALEDIA W. DENTON, d/b/a Marden Manufacturing Company, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the decree of that Court entered December 9, 1954, modifying and enforcing, as modified, an order of the National Labor Relations Board.

### OPINIONS BELOW

The decision and order of the National Labor Relations Board (R 80) are reported at 106 NLRB 247 and are printed in Appendix B hereto, *infra,* p. 3. The opinion of the Court of Appeals (R 153) printed in Appendix B hereto, *infra,* p. 13, is reported in 217 F. 2d 567.

## JURISDICTION

The decision of the Court of Appeals was rendered and its decree entered December 9, 1954 (R 153, 162). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

## QUESTIONS PRESENTED

1. Whether the failure of the petitioners to accede to specified union demands, while agreeing to others and making counter proposals to still others, during brief bargaining sessions held on each of three days is sufficient evidence of a refusal to bargain collectively as required by Section 8 (a) (5) of the National Labor Relations Act where it is found also that the petitioners had previously interfered with their employees in violation of Section 8 (a) (1), discriminatorily discharged employees in violation of Section 8 (a) (3) and (1), and stated that they would never sign a contract with the union.

2. Whether the court below departed from the "substantial evidence" requirement of Section 8 (c) of the National Labor Relations Act in declining to reject the findings of the Board that the petitioners discriminatorily discharged employees Walter Lassiter and Calvin Singleton.

## STATUTE INVOLVED

The statutory provisions involved are Section 8 (a) (1), (3), and (5), Section 8 (d), and Section 10 (b), (c), and (e) of the National Labor Relations Act as amended by the Labor Management Relations Act, 61 Stat. 140, 142, 146, 147, 29 U.S.C., §§ 158 and 160. The pertinent text of such provisions is printed in Appendix A, *infra*, p. 1.

## STATEMENT OF THE CASE

### Jurisdiction of Federal Court

This case came before the Court of Appeals upon petition of the National Labor Relations Board filed February 1, 1954, for enforcement of its order directed October 29,

1953, to the petitioners (R. 4).* The jurisdiction of the Court of Appeals was invoked by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

**Petitioners' Business**

The petitioners are a partnership engaged in the manufacture and sale of brush- and weed-cutting machinery at Auburndale, Florida (R 97). They normally employ about 21 persons in their operation (BA 9).

**Union's Entry Into Petitioners' Plant**

The conduct of the petitioners found to constitute unfair labor practices took place in the spring and early summer of 1952 as a result of a campaign of the United Steel Workers, CIO, to organize their employees. The Steelworkers (hereinafter called the "Union") apparently began their activities among the petitioners' employees about February, 1952 (R 6). On May 5, the production and maintenance employees voted for the Union which was, therefore, certified on May 13 as their exclusive bargaining representative (R 18, 21).

**Petitioners' "Interference" With Employees**

The Board found that, during the period preceding the election of May 5, the petitioners interfered with their employees through coercive interrogation and intimidation of them by Marion Denton, one of the petitioners, and by Brewster, the foreman (R 80-81, 98-104). Most of

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* The designation "R" indicates a reference to the record certified by the clerk of the court below under the caption "Transcript of Record." Other designations of record references are used herein: "BA" refers to the appendix filed with the court below by the Board as "Appendix to Brief for Petitioner", and "PA" refers to the appendix filed therewith by the petitioners as "Appendix to Respondents' Brief", both of which have been appropriately certified. The three certified portions of the record are filed herein with this petition pursuant to Rule 21.

the facts of such conduct and all the implications of its impropriety were denied at the hearing by Denton and Brewster, and by some of the Union members who were witnesses for the General Counsel (PA 19, 26-27, 73, 78, 80-81). The Board, however, chose to believe other witnesses and to draw other inferences. Denton himself testified that he had told the assembled employees a few days before the election that he would not sign a union contract (BA 152-153).

**Lay-Off of Employees Before Strike**

After the election, the petitioners laid off three employees effective May 9, (R 104, 105, 107). The Board was unable to conclude that one of the three, David Lassiter, was the object of discriminatory treatment (R 83, 104-105). It found that the others, Walter Lassiter and Calvin Singleton, were discriminatorily discharged or laid-off against the petitioners' contention that all three had been laid off as those least efficient employees who should go in a reduction in force required to restore the normal level of employment at the plant (R. 83, 105-109).

**Discharge of Employee Before Strike**

On May 23, the petitioners discharged H. D. Lassiter for excessive absenteeism and drinking on the job (R 156). The General Counsel adduced testimony designed to show that this discharge was discriminatorily motivated, and the Board so found (R 83-86, 110-114).

**Collective Bargaining**

Representatives of the petitioners and of the Union met on three occasions for negotiation of a labor contract (R 81, 114-116).

The first meeting held on May 25 was preliminary and very short (R 114; BA 106). The Union presented a proposed contract which the petitioners' representative read, but it was not discussed in detail (R 114).

The next meeting was on June 4 (R 114). It was "very amiable" and was the longest of the bargaining sessions, lasting an hour or even two hours (PA 52; BA 22, 110). During its course, the petitioners agreed to provisions respecting recognition, the composition of the bargaining unit, the maintenance of a bulletin board for union notices, their responsibility for the safety and health of employees, hours of work, and overtime pay (R 114-115). Also, the petitioners thought that agreement had been reached upon a proposal for a probationary period during which new employees might be discharged without consultation with the Union, whereas the Union mistakenly believed that the agreement related to a union-training program (R 115). The petitioners' representative rejected union-shop and check-off provisions but promised to discuss with Denton the type of union-security clause which they would accept (R 115; BA 23). They rejected the Union's proposal for a wage increase without counter-proposal, and the Board found, despite the petitioners' testimony otherwise, that they similarly denied a request for paid vacations and holidays (R 81, 86, 115; BA 124). They were willing to incorporate a provision for grievance procedure "only on condition that no international representative should participate in grievance presentations", according to the Board's finding (R 81, 115). In this connection, however, the Union's principal negotiator testified that the petitioners' representative "said we might be able to work out some agreement on arbitration" but that the petitioners would not agree to it "at the present time" (BA 25). The petitioners also counter-proposed separate seniority lists for hourly workers and piece workers, according to one of the Union representatives (PA 53; BA 112). This same man testified in effect and without contradiction that, at the close of the second meeting, it was agreed that the Union representatives would take some of the petitioners' proposals up with the Union before the next meeting (PA 54-55).

On June 25, the negotiators met for about 20 minutes (R 116; BA 114). The Union representatives hurriedly read through the proposed contract, and asked, article by article, whether the petitioners' position had changed (R 116; BA 118). The petitioners' representative answered that they had not changed their minds on those things he had definitely decided upon (R 116). During the reading of the contract, a heated dispute arose over the misunderstanding of the parties at the meeting of June 4 as to the proposal for a probationary period (R 116). The acrimony subsided, however, and the reading of the contract proceeded (R 116). Lacking achievement, the Union representatives closed the meeting by leaving (R 116).

With nothing further, the Union at a meeting on June 30 heard from its representatives a report in detail of the "lack of progress made in the negotiations" and voted to strike the following morning, July 1 (R 118). The decision was telephoned later that night to one of the petitioners' bargaining representatives who replied that the Union could take or leave the petitioners' proposal and that, if the employees should strike, they would come back (R 119).

The strike started July 1 as scheduled (R 119).

**"Exclusion" of Member of Union Negotiating Committee From Bargaining Sessions**

At either the meeting of May 27 or June 4, a Union representative asked one of the petitioners' representatives for his *permission* that H.D. Lassiter attend the meeting (R 116). Lassiter, who had been elected a Union representative after his discharge on May 23, had gone to the meeting place with the other Union representatives and was in an automobile outside, awaiting word as to his participation in the session (R 116). The petitioners' representative refused to give his permission on the ground that he was no longer an employee of the petitioners (R 116). Lassiter attended none of the bargaining conferences (R 114-116).

**The Strike and the Strikers' Discharge**

Following the commencement of the strike on July 1, the plant was shut-down until July 7 (R 81, 119). On that day, a number of striking employees returned to work along with five new employees (R 119). In the meanwhile, seven strikers had been discharged on July 2 for "failure to report to work"; another was discharged for the same reason on or before July 8; and a third on or before July 9 (R 119). On the latter date three employees, who the Board found were a committee representing all the strikers, met with Denton in the morning, told him that the strike had been called off, and notified him that the strikers were ready to return to work unconditionally (R 121). Denton declined to reinstate anyone at that time, stating that he had hired replacements (R 121). Later on July 9, another "committee" consisting of four men attempted to see Denton but were told by the petitioners' superintendent that Denton would not talk to any of them and that new employees had been hired to take their places (R 112). One of the members of the second committee was reinstated by the petitioners October 18, 1952, and a member of the first committee was unconditionally reemployed by them November 6, 1952 (R 125, 87).

**Findings and Order of Board**

Upon the foregoing facts, the Labor Board found that the petitioners had engaged in unfair labor practices including refusal to bargain with the Union in violation of Section 8 (a) (5) of the National Labor Relations Act and discrimination in the hire and tenure of employees in violation of Section 8 (a) (3) and (1) of the Act (R 81, 118, 105). It ordered the petitioners to cease and desist from such practices and to take affirmative action, including reinstatement of all the employees who were discharged July 9 at the close of the strike, which it found to be an unfair labor practice strike, and who have not been reinstated; reinstatement of Walter Lassiter, Calvin Singleton,

and H.D. Lassiter; and making those employees and all others discharged at the close of the strike whole for the loss of pay (R 88).

### Opinion and Decree of Court Below

The court below concluded that the Board's findings and order in all respects but one were entitled to enforcement as supported by substantial evidence on the record considered as a whole within the authority principally of *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134-135 (CA 1), and of *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (R 158, 159). The single exception was in respect of the Board's order of reinstatement and back pay award to H. D. Lassiter wherein it held that the Board's finding of discriminatory discharge was not supported by substantial evidence, citing *N.L.R.B.* v. *Fulton Bag & Cotton Mills*, 175 F. 2d 675, 677 (CA 5), and other cases (R 160). Accordingly, it modified the Board's order so as to exclude relief to H. D. Lassiter and decreed enforcement of the order as thus modified (R 161).

## REASONS FOR GRANTING THE WRIT

The court below holds that the failure of the petitioners to accede to proposals of the Union upon certain subjects when considered in the light of the petitioners' prior violations constitutes substantial evidence of failure to comply with the good faith bargaining requirement of Section 8 (a) (5) of the National Labor Relations Act. The petitioners ask the Court to review especially this holding on the ground that the court below has decided a federal question in a way conflicting with *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, and *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395.

Never since *Jones & Laughlin* has it been doubted that the National Labor Relations Act does not compel any agreement whatever. Here the necessary consequence of the holding of the court below is that an employer with a

"bad" labor background must agree with the union in collective bargaining somewhere in the fields of wages, grievance procedure, union security, check-off, and paid vacations and holidays. If he does not, even though bargaining has extended over only three or four hours and he has agreed upon proposals outside these fields and made unanswered counter-proposals upon some of the Union demands in these areas, there is sufficient evidence of violation to subject him to the sometimes ruinous remedies of the law.

To permit a union or, now, an employer to run to the Labor Board with assurance of success whenever the one party does not accede to the demands of the other would plainly tend to destroy the very bargaining which the Act was designed to protect. Here the prejudice to the law is aggravated beyond the ordinary case, however, for the evidence of conditions transpiring during the negotiating periods is barren of any trace of a disposition on the part of the petitioners not to bargain in good faith with the purpose of arriving at an agreement.

There was no delay in the meetings for bargaining. The petitioners met with the Union representatives upon prearranged times. There was no reopening of any question previously settled except upon the mistake of the Union. There was but one instance of ill feeling in the meetings, and that was expressed mutually by a representative of the petitioners and a representative of the Union and arose from a mistake of the Union. When the negotiations were terminated, it was the Union which terminated them. Most important, the petitioners accepted many Union proposals and made counter-offers to others.* These conditions all

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* The trial examiner and the Board found that the petitioners did in fact make counter-proposals (R 81, 115) but not all that were actually made, such as that upon seniority testified to by representatives of both parties (PA 53; BA 112). The court below does not mention this circumstance, one of the strongest indicia of good faith. *Hearings before Senate Committee on Labor and Public Welfare on S. 1126 and S. 55, 80th Cong., 1st Sess.*, p. 1914 (1947).

point to good faith on the part of the petitioners. See Note, *Good Faith Bargaining in Labor Negotiations,* 61 Harv. L.R. 1224.

The court below attached no significance to the petitioners' conduct at the bargaining conferences. Indeed, it did not even consider this conduct except in respect of the acceptance of some Union demands. It found that the petitioners had made only "nominal and illusory 'concessions' during these conferences with regard to the grant of plant bulletin board space to the union, recognition of the appropriate bargaining unit, overtime pay, and assumption of responsibility for maintaining plant health and safety conditions" (R 157). The court explained its characterization of these concessions as "more or less nominal and illusory, principally because practically all of them were independently required either by Federal or Florida state law" (R 157, fn. 5).

The simple fact is there is not one scintilla of evidence in this record to support the court's finding that any of these concessions was required by law. It is true that the Fair Labor Standards Act imposes minimum standards for hours to be worked without overtime pay, but there is no showing here which warrants a finding that the concession of the petitioners embodied *only* those standards. It is also true that Florida requires employers to assume responsibility for maintaining the health and safety of employees while at work. But, again there is absent from this record any indication that the concession of the petitioners in this respect was confined to a mere acceptance of the broad responsibility as expressed in Florida statutes. Also, if it be true that the definition of the bargaining unit is a matter exclusively within the competence of the Labor Board, which the petitioners doubt, then the counter-proposal of the petitioners that the bargaining unit be described in the language of the Board perhaps saved any contract which might have been agreed upon from the taint of illegality. That is hardly evidence of bad faith. And

the circumstances here are a far cry from *Reed & Prince* where many incidents connected with the bargaining in 13 meetings extending over four months beyond the mere rejection of union demands entered into the judgment of guilty of refusing to bargain in good faith.

The rule of *Jones & Laughlin* against a requirement of agreement in collective bargaining has recently been reaffirmed in *National Labor Relations Board* v. *American National Insurance Co.* where this Court found that the court below had correctly applied the good-faith test of bargaining. The court below has even more recently adhered to that test in a factual situation not unrelated to that of the instant case. *National Labor Relations Board* v. *National Paper Co.*, 216 F. 2d 859. The record of the courts in general and of the court below in particular in applying this standard should not now be marred by permitting the decision here to stand without review. See *National Labor Relations Board* v. *I.B.S. Mfg. Co.*, 210 F. 2d 634, 637-638 (CA 5); *National Labor Relations Board* v. *National Shoes*, 208 F. 2d 688, 691 (CA 2); *National Labor Relations Board* v. *Tower Hosiery Mills*, 180 F. 2d 701, 706 (dissenting opinion) (CA 4).

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BURR TRACY ANSELL,
*Counsel for Petitioners.*

A. R. SURLES, JR.,
*Of Counsel.*

## APPENDIX A

### Statutory Provisions

The National Labor Relations Act, as amended by the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. § 141 et seq., provides in pertinent part as follows:

Sec. 8 (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Sec. 8 (d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

Sec. 10 (b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, * * *

Sec. 10 (c). The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the

complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

Sec. 10 (e). The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. * * *

## APPENDIX B

### Decision and Order

United States of America
Before the National Labor Relations Board
Marion G. Denton and Valedia W. Denton
d/b/a Marden Manufacturing Company
Case No. 10-CA-1523

and

United Steelworkers of America, CIO

On July 13, 1953, Trial Examiner Stephen S. Bean issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices, and recommending that they cease and desist therefrom and take certain affirmative action as set forth in the Intermediate Report attached hereto. Thereafter, the Respondents filed exceptions to the Intermediate Report and a supporting brief.[1]

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committeed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the Respondents' exceptions and brief, and the entire record in this case, and hereby adopts the findings,[2] conclusions,

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[1] The Respondents' request for oral argument is denied because the record and the Respondents' exceptions and brief, in our opinion, adequately present the issues and positions of the parties.

[2] We note and correct the following factual inaccuracies in the Intermediate Report which do not affect our findings or conclusions in this case: (1) the Trial Examiner found that foreman Brewster called two employee meetings on May 2, 1952, whereas in fact he summoned employees to but one meeting on that date; (2) the Trial Examiner found that foreman Brewster stated that Denton would move to California on account of the health of Denton's wife, whereas in fact Brewster stated that he (Brewster) would move to California on account of the health of his wife; (3) the Trial Examiner found that sometime in May, Denton told Keefer he had had a beer or two, whereas in fact it was H. D. Lassiter who made the statement to Keefer with regard to

and recommendations of the Trial Examiner, with the following additions and modifications:

1. The General Counsel offered in evidence at the hearing copies of (1) the charge and amended charge in this case, (2) the complaint, and (3) notice of hearing, together with various documents purporting to show that such papers were mailed to and received by the Respondents or that delivery thereof was refused by Respondents. Respondents objected to the receipt of all these matters in evidence on the ground, *inter alia*, that the foregoing proofs of service or of refusal of delivery were not properly authenticated. Respondents' objection was overruled by the Trial Examiner, and Respondents except. Respondents do not show how they were prejudiced by this ruling. There is no issue in the cases as to the adequacy of the Respondents' opportunity to prepare a defense and meet the charges against them. The Respondents filed a timely answer to the complaint, appeared at the hearing, and fully participated in the litigation of all the issues. Nor is there any issue as to whether the original charge was in fact received by the Respondents. One of the documents introduced in evidence was an affidavit of mailing of a copy of the original charge to the Respondents by registered mail, to which affidavit was attached a return receipt therefor purporting to be signed by Respondent Marion Denton. Respondents do not contend that this material was not received by them. Denton, although testifying at the hearing, was not questioned by his counsel about this signature. Under these circumstances, we find no merit in Respondents' exception on this point.

Respondents' counsel also objected at the hearing to the examination of Respondent Marion Denton concerning instructions given by him to counsel regarding the conduct by the later of negotiations with the Union. The objection,

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his (Lassiter's) drinking; and (4) the Trial Examiner found that the Respondents refused to bargain with the Union since May 13, 1952 (the date of the Union's certification), whereas the record shows, and we find, that the respondents' refusal to bargain dates from May 27, 1952 (the date of the first negotiation meeting of the parties).

which was based on client-attorney privilege, was overruled by the Trial Examiner and Respondents except. The Trial Examiner did not rely upon the foregoing testimony in finding that the Respondents violated Section 8 (a) (5) of the Act, nor do we. Accordingly, we find that any possible error in admitting this testimony was not prejudicial.

Respondents also except to: (1) the Trial Examiner's conduct of the hearing in that he allegedly permitted representatives of the Union to be seated inside the bar in a position to coach and encourage witnesses; (2) the absence from the hearing during its latter stages of E. V. Riffe, a representative of the Union, despite the fact that Riffe had been subpoenaed to appear; and (3) to the "evident prejudice of the Trial Examiner in favor of General Counsel and the Charging Union." As to (1), the record shows that only Riffe, a representative of the charging union whose appearance was noted on the record, was permitted to be seated inside the bar; and, with respect to the instances of alleged coaching relied upon by the Respondents, the record shows either that the Trial Examiner ascertained that the witness was not aware of such alleged coaching, or that he cautioned against it; as to (2), the record does not show that any request was made by the Respondents for enforcement of the Riffe subpoena, nor that any continuance of the hearing was requested for that purpose. Riffe did, in fact, appear at the early stages of the hearing as a witness for the General Counsel and was cross-examined by the Respondents. Moreover, Respondents have so far failed to state for what purpose they desired Riffe's further testimony; as to (3), the general allegation of the Trial Examiner's prejudice in favor of the General Counsel and the Union is not supported by the record. Accordingly, we find no merit in these exceptions.

2. We agree with the Trial Examiner that the Respondents discriminatorily discharged Walter Lassiter and Calvin L. Singleton. Because no exception has been filed thereto, we also adopt the Trial Examiner's finding that the General Counsel failed to sustain the burden of proving that Respondents discriminated in the hire and tenure of employment of David Lassiter.

3. We also agree with the Trial Examiner's finding that the discharge of H. D. Lassiter was discriminatory. However, in so finding, we rely only upon the following:

H. D. Lassiter, the father of David Lassiter and Walter Lassiter, was hired in August 1948. He operated the Respondents' turret lathe, a key operation requiring a skilled operator. He was a member of the Union, a fact which he himself revealed to Respondent Marion Denton. He was outspoken in his support of the Union. On one occasion, in front of the employees assembled to hear Denton's anti-union remarks, which are set forth in the Intermediate Report, he was the only employee who spoke up on behalf of the Union. Denton, in a conversation with another employee, referred to H. D. Lassiter as a union "ring-leader."

Shortly before the May 5, 1952, election at the Respondents' plant, Lassiter was told by Denton that the Union could "affect" him and his sons; and Albert Brewster, a supervisor, told Lassiter that if the Union won the election the plant would be shut down and Lassiter and his sons would lose their jobs. Shortly after the election Lassiter's two sons were discharged, one of them, as found above, discriminatorily. Lassiter himself was discharged on May 23.

In its brief, the Respondents contend that Lassiter was discharged because of drunkenness on the job and absenteeism caused by his drinking. Respondent Marion Denton, however, testified only that Lassiter was discharged for absenteeism.

As set forth in the Intermediate Report, for a number of years before his discharge, Lassiter, as well as practically all the other employees and their foreman had been in the habit of drinking beer during working hours. In May 1952, Lassiter was found to have been drinking on the job, and was warned about such conduct. The record also shows that Lassiter was absent 47 days in 1951, and 28 days in 1952, including 4 days of unexplained absence during the week in which he was discharged.

However, like the Trial Examiner, we are convinced that the reasons advanced by the Respondents were not the motivating cause for Lassiter's discharge. The contention

in Respondents' brief that Lassiter was discharged for drinking on the job is contradicted by Denton's own testimony that Lassiter was discharged for absenteeism. Moreover, while Lassiter was warned against drinking on the job shortly before his discharge, there is no evidence that he was thereafter guilty of such misconduct. Furthermore, as already stated, whatever drinking he indulged in prior to that warning was in conjunction with other employees and his foreman, a plant practice which, strange as it may seem, had been tolerated by the Respondents for a number of years. There is no evidence that any other employee was ever disciplined for drinking.

With regard to the contention that Lassiter was discharged for absenteeism, the record shows that, despite Lassiter's record of absences in 1951 and 1952, no issue was ever made of his absenteeism by the Respondents until shortly after the Union had won the election. Although absent without explanation four days during the week in which he was discharged, Lassiter's record shows that at other times he had weekly absences of 3, 4, and 5 days; and on one occasion he was absent an entire week.

Under these circumstances, and especially in view of the fact that the threats by Denton and Brewster against Lassiter and his sons were in fact carried out against the sons—in one case discriminatorily—, and because of the timing of Lassiter's discharge so soon after the Union's victory in the election, we believe the inference is inescapable that the asserted reasons for the discharge are pretexts, and we are convinced that Lassiter was discriminatorily discharged because of his membership in, and outspoken sponsorship of, the Union.

4. We agree with the Trial Examiner's conclusion that the Respondents refused to bargain collectively with the Union in violation of Section 8 (a) (5). However, in so finding, we do not adopt a possible implication present in one part of the Intermediate Report that the Respondent's failure to make concessions to the Union with respect to wages or financial benefits was *per se* a refusal to bargain within the meaning of the Act, rather than only "a material factor" in assessing good faith. Nor do we find it necessary to consider, or pass upon, the Respondents'

refusal to allow the Union to bring a tape recorder to a bargaining session, in concluding that there was a refusal to bargain in violation of Section 8 (a) (5).

5. Like the Trial Examiner, we find that the strike that occurred at the Respondents' plant was an unfair labor practice strike caused by the Respondents' failure to bargain in good faith and by their refusal to reinstate employees who had been discriminatorily discharged. Accordingly, we find that Grady Carroll, Melvin Purvis, R. B. Granger, J. D. Story, A. C. Letchworth, H. N. Wells, T. C. Singleton, W. W. Singleton and J. R. Smith were unfair labor practice strikers and that the Respondents' refusal to reinstate these employees on July 9, when they unconditionally applied for reinstatement, was discriminatory.

In view of our determination that the strike was an unfair labor practice strike, we need not pass upon the Trial Examiner's statement by way of dictum concerning the applicable law if the strike be regarded as an economic strike from its inception.

## The Remedy

We do not agree with the Trial Examiner's conclusion that the Respondents unlawfully conditioned the reinstatement of W. W. Singleton upon his withdrawal of a claim for overtime pay. As the Trial Examiner found, Singleton was reinstated on November 6, 1952, on his own application. On the next day, he was asked by Respondent Marion Denton to withdraw a previously-filed wage claim for overtime pay. After refusing to withdraw the claim, Singleton, without explanation, failed to report for work the next day or thereafter.

In the absence of further evidence bearing on this issue, we find, contrary to the Trial Examiner, that Singleton's compliance with Denton's request was not a condition, either express or implied, of his continued employment by the Respondents.

Accordingly, we find that Singleton was reinstated on November 6, 1952, and thereafter voluntarily left the Respondents' employ. For this reason we shall not order

his further reinstatement, as the Trial Examiner recommended. We shall, however, order that Singleton be made whole, in the manner set forth in the section of the Intermediate Report entitled "The Remedy," for any loss of pay he may have suffered from July 9, 1952, the date of the Respondents' discrimination against him, to November 6, 1952, the date of his reinstatement.

## ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, Marion G. Denton and Valedia W. Denton, d/b/a Marden Manufacturing Company, of Auburndale, Florida, their agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in United Steelworkers of America, C.I.O., or in any other labor organization of their employees, by discharging or refusing to reinstate any of their employees, or by discriminating in any other manner in regard to the hire and tenure of employment of their employees or any term or condition thereof;

(b) Refusing to bargain with the above-named labor organization as the exclusive representative of all production and maintenance employees, including truck drivers, at their Auburndale, Florida, plant, excluding office employees, professional employees, guards or watchmen, and supervisors as defined in the Act;

(c) Threatening employees with the closing and removal of their business and with other reprisals for engaging in union activity; promising employees rewards for refraining from union activity; interrogating employees as to their union affiliations or activities; or soliciting employees to keep under surveillance, and report, union activities;

(d) In any other manner, interfering with, restraining, or coercing their employees in the exercise of their right to self-organization, to join or assist United Steelworkers

of America, C.I.O., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer Walter Lassiter, Calvin L. Singleton, H. D. Lassiter, Grady Carroll, Melvin Purvis, R. B. Granger, J. D. Story, A. C. Letchworth, T. C. Singleton and J. R. Smith, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make all of said employees and N. H. Wells and W. W. Singleton whole for any loss of pay suffered, in the manner set forth in the section of the Intermediate Report entitled "The Remedy," and hereinabove.

(b) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of their employees in the aforesaid appropriate unit with respect to rates of pay, wages, and hours and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement;

(c) Post at their Auburndale, Florida, plant copies of the notice attached hereto as an "Appendix."[3] Copies of said notice, to be furnished by the Regional Director of the Tenth Region, shall, after being duly signed by the Respondents, be posted by them immediately upon receipt thereof and be maintained by them for a period of sixty

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[3] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER."

(60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(d) Preserve and, upon request, make available to the Board and its agents, for examination and copying, all pay-roll records, social security payment records, timecards, personnel records, and all reports and other records necessary to determine the amount of back pay due;

(e) Notify the Regional Director for the Tenth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondents have taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges that the Respondent discriminatorily discharged David Lassiter.

Signed at Washington, D. C. Oct 29 1953

Guy Farmer, Chairman
Abe Murdock, Member
Ivar H. Peterson, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

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APPENDIX

## NOTICE TO ALL EMPLOYEES

## PURSUANT TO
## A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

WE WILL BARGAIN collectively upon request with UNITED STEELWORKERS, CIO, as the bargaining representative of the employees in the bargaining unit

described below with respect to rates of pay, wages, hours of employment, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees, including truck drivers, at our Auburndale, Florida, plant, excluding office employees, professional employees, guards or watchmen, and supervisors as defined in the Act.

WE WILL NOT discourage membership of our employees in the above-named or any labor organization by discharging or refusing to reinstate any of them, or by discriminating in any other manner in regard to their hire and tenure of employment, or any term or condition of their employment.

WE WILL OFFER all employees named below immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to any seniority or other rights and privileges previously enjoyed, and we will make all said employees and N. H. Wells and W. W. Singleton whole for any loss of pay suffered as a result of the discrimination against them:

| | |
|---|---|
| Walter Lassiter | J. E. Story |
| Calvin L. Singleton | A. C. Letchworth |
| Grady Carroll | T. C. Singleton |
| Melvin Purvis | J. B. Smith |
| R. B. Granger | H. D. Lassiter |

WE WILL NOT threaten our employees with the closing or removal of our plant or other reprisals for their engaging in union activities. We will not interrogate our employees as to their union affiliations or activities; we will not solicit our employees to keep under surveillance and report union activities; and we will not promise our employees reward for refraining from union activity.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

MARION G. DENTON AND
VALEDIA W. DENTON
d/b/a MARDEN MANUFACTURING
COMPANY
(Employer)

Dated..... By.....
(Marion G. Denton)

Dated..... By.....
(Valedia W. Denton)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

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**Opinion of the Court Below**

Before HUTCHESON, Chief Judge, and RIVES and TUTTLE, Circuit Judges.

RIVES, Circuit Judge: The Board petitions for enforcement of its order issued against respondents on October 29, 1953, based on findings (1) that respondents have restrained and coerced their employees in the exercise of their right to engage in union activity in violation of Sec-

tion 8(a)(1) of the Act; (2) have discharged certain employees or refused to reinstate them because of their union activity, in violation of Sections 8(a)(3) and (1); and (3) have refused to bargain collectively in good faith with the union, in violation of Sections 8(a)(5) and (1) of the Act. 29 U.S.C.A., Sections 158(a)(1), et seq. The Board's decision and order are reported at 106 N.L.R.B. 247.

Respondent Company is engaged in the manufacture and sale of brush and weed cutting machinery at Auburndale, Florida. In a Board conducted election involving the Company's production and maintenance employees, held on May 5, 1952, the charging union prevailed,[1] and was duly certified on May 13 as the accredited bargaining representative of the employees. There is testimony credited both by the Trial Examiner and the Board that for about one month prior to the election the Company, principally through its supervisor, Brewster, and owner, Marion Denton, sought to hinder the union's organizational campaign by interrogation and intimidation of its pro-union employees. Specifically, Brewster told employee Purvis "that if we went on and tried to get the Union in—it was going to shut every one of our jobs down", and he later promised employees Carroll and Letchworth that if the union "didn't come in * * he would give us all piecework back and we would make more money." About three weeks before the election, Brewster promised a higher paid piecework job to an hourly paid employee, Granger, if he would "pull out of the Union", and urged employee H. D. Lassiter to renounce the union.

In addition to the above recited testimony as to specific threats and promises to employees by Brewster made to forestall the advent of the union in the plant, there is further credited testimony as to respondent Marion Denton's active participation in the pre-election anti-union campaign. When employee H. D. Lassiter openly advocated unionization in his presence, Denton remarked that he had fired Brewster's predecessor, Clark, "on account of the Union",

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[1] The union here involved is United Steel Workers of America, CIO.

and further intimated that the union might adversely affect H. D. Lassiter and his two sons, Walter and David, both of whom were then employed by respondents. Denton's threat was subsequently reiterated by Brewster, who told H. D. Lassiter in effect that if Denton "shut the shop up" because of the union, Lassiter and his sons would all lose their jobs. Three days before the election the employees were assembled in the plant machine shop at Denton's instance, where he told them that he was disregarding his lawyer's advice in stating "he would never sign a contract with any union";[2] that the employees could gain nothing by paying union dues; that employees of a nearby plant had been discharged for union activity, and had failed in their efforts to be reinstated; that neither the union nor the Government could put the employees "back to work or pay * for the time * lost"; that "maybe the scale of hours would be cut if the Union got in"; that they could join the union and he would not discharge any of them for doing so, but "he had run his business his way and the Union or nobody else was not going to tell him how to run his own business."

With reference to the findings as to respondents' discriminatory discharge of employees Walter Lassiter and Calvin Singleton, the credited testimony broadly reveals that both these employees had performed their duties with apparent satisfaction and without reprimand until they became actively affiliated and identified with the union's organizational campaign, after which they fell into disrepute with both Denton and Brewster and were discharged. While admittedly there is testimony tending to support respondents' contention that these two employees were justifiably discharged, on recommendation of Brewster and Keefer, for non-productiveness and lack of work, other testimony and inferences support the finding of both the Trial Ex-

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[2] Denton's disclaimer of any intention of ever reaching an agreement with the union was reiterated to a number of respondents' employees both by Denton and plant manager, Keefer, before and after the union's election victory on May 5th.

aminer and the Board that their discharges were discriminatorily motivated.[3]

The testimony relied upon to support the finding of H. D. Lassiter's discriminatory discharge fairly reveals that, although this employee openly revealed his pro-union sympathy to Denton during the union campaign and was impliedly threatened with discharge therefore, he had already subjected himself to justifiable discharge under other Board findings for excessive absenteeism and drinking on the job during this period.[4] Relying, however, upon an alleged inconsistency between respondent's contention that H. D. Lassiter was discharged "for drinking on the job" and Denton's testimony "that Lassiter was discharged for absenteeism", and on other employee testimony found to support the inference that drinking on the job was "a plant practice which, strange as it may seem, had been tolerated by the Respondents for a number of years", the Board concluded that his admitted absenteeism and drinking "were not the motivating causes for Lassiter's discharge", but that he was actually terminated pursuant to prior threats for his union advocacy.

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[3] For example, although the Company showed that Walter Lassiter had been absent from work for several weeks in 1952 because of a hernia operation, there is other testimony that such absences, occurring prior to Lassister's adherence to the union, were with the Company's consent and approval; that Denton even advanced him money to pay his hospital bills on that occasion and Brewster warned him to "take it easy" upon his return to the shop so as to avoid re-injury. There is further credited testimony rebutting the Company's proof that Singleton was justifiably discharged because his temporary steel stacking job had been completed, it being shown that, prior to his active advocacy of the union, he was a regular employee, like Walter Lassiter, doing satisfactory work without warning or threat of impending discharge.

[4] The Board found that, "Lassiter, as well as practically all the other employees and their foreman had been in the habit of drinking beer during working hours. In May 1952, Lassiter was found to have been drinking on the job, and was warned about such conduct. The record also shows that Lassiter was absent 47 days in 1951, and 28 days in 1952, including 4 days of unexplained absence during the week in which he was discharged."

With reference to the 8(a)(5) refusal to bargain violation, the Board mainly adopted findings by the Trial Examiner that the Company, through its attorney, Surles, and plant manager, Keefer, met with the principal union negotiators, Riffe and Gravatt, on May 27, June 4, and June 25, 1952, and that at these bargaining conferences a number of proposed contractual provisions were discussed, including grievance procedure, union liability, a probationary period for new employees, etc. Though the Company made certain nominal and illusory "concessions" during these conferences with regard to the grant of plant bulletin board space to the union, recognition of the appropriate bargaining unit, overtime pay, and assumption of responsibility for maintaining plant health and safety conditions,[5] it refused to grant any wage increase or make any other financial concessions to the union,[6] and also refused to accede to union demands on other bargaining issues of grievance procedure, union security, dues check-off, and paid vacations and holidays.

The Trial Examiner and Board, apparently acknowledging the rule adhered to by this Court in *American National Insurance Co.* v. *N.L.R.B.*, 187 F. 2d. 307, affirmed 343 U.S. 395, and most recently restated in *N.L.R.B.* v. *National Paper Co.*, slip opinion dated November 16, 1954, holding that the Act does not require an employer to capitulate to union demands on any bargaining issue or to make any particular concession, never-

[5] These so-called "concessions" were characterized as more or less nominal and illusory, principally because practically all of them were independently required either by Federal or Florida state law. See N.L.R.B. v. Inter-City Advertising Co., 4th Cir., 190 F. 2d. 420, 421, cert. denied 342 U.S. 908; Fair Labor Standards Act, 29 U.S.C.A. Sec. 201, et seq., as amended; Title 49 Fla. Stat. Ann. Sec. 440.56(1).

[6] The credited testimony reveals that when union negotiator, Riffe, requested permission to have the Company's books inspected to determine whether it was financially able to grant a wage increase, Atttorney Surles refused, stating "that Denton was able to give an increase but that he was not willing to do so * because of the world situation * with everything so uncertain."

theless held that the Company's failure to yield in any respect was "a material factor" in determining whether it had actually complied with its statutory obligation to bargain in good faith. Considering the Company's attitude throughout the bargaining period against the background of the other violations found, and particularly in the light of prior statements by Denton and his supervisors both before and after the election that he "would never sign a contract with any union", we think substantial evidence supports the Board's finding that the Company had throughout engaged only in "surface negotiations", and that its mere "willingness to talk" was insufficient to comply with the good faith bargaining requirement of Section 8(a)(5).[7] See *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 1st Cir., 205 F. 2d. 131, 134-135; *N.L.R.B.* v. *Athens Mfg. Co.*, 5th Cir., 161 F. 2d. 8.

We think the Board's findings and order as to the 8(a)(1) violations based on the above recited and other testimony of coercive interrogation and intimidation of Company employees for union activity by Denton and his supervisors, Brewster and Keefer, as well as the 8(a)(3) and (1) violations resulting from the discriminatory discharge of Walter Lassiter and Calvin Singleton, are clearly entitled to enforcement as supported by substantial evidence on the record considered as a whole. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474. We think, however, that the Trial Examiner and Board, in finding discriminatory motivation in the discharge of H. D. Lassiter, have inadevertently attached undue emphasis to the testimony as to his conceded pro-union status, while minimizing other substantial evidence of his admitted derelictions

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[7] The undisputed testimony supports the Trial Examiner's further finding, impliedly approved by the Board, of independent violations of Section 8(a)(5), inherent in Denton's adamant refusal to permit the union's own international representatives to participate in any grievance procedure, and its exclusion of H. D. Lassiter from bargaining sessions after his discharge solely on the ground that he was no longer an employee of the Company. See N.L.R.B. v. Deena Artware, Inc., 6th Cir., 198 F. 2d. 645, 651, cert. den. 345 U.S. 906.

and breaches of plant discipline after warning, so that upon this record we cannot reject respondents' emphatic assertion that, as a key plant employee, his "4 days of unexplained absence during the week in which he was discharged", as well as his beer drinking on the job after warning,[8] actually prompted his discharge for justifiable cause under the Act. Certainly, we cannot say, viewing the record as a whole, that the burden of proof that his discharge was discriminatorily motivated has been met, or that the Board's finding of unlawful motivation and its order of reinstatement in H. D. Lassiter's behalf is supported by substantial evidence. We further doubt whether the testimony viewed in its entirety fairly supports any finding or inference that respondents had effectively condoned H. D. Lassiter's absenteeism and on the job drinking with knowledge of any "plant practice" in the latter regard. Assuming, however, that the Trial Examiner and Board correctly held respondents had waived H. D. Lassiter's derelictions in this respect before knowledge of his active union advocacy, respondents, nevertheless, did not forfeit or waive their right under the Act to discharge him for such undesirable practices in the future, nor were they required to continue excusing his absenteeism and drinking in order to avoid violation of Section 8(a)(3) of the Act. This Court has consistently recognized that neither passive union membership nor active union leadership, as such, is a guarantee against discharge for justifiable cause under the Act. *N.L.R.B.* v. *Fulton Bag & Cotton Mills*, 5th Cir., 175 F. 2d. 675, 677; *N.L.R.B.* v. *Williamson-Dickie Mfg. Co.*, 5th Cir., 130 F. 2d. 260, 265; see also *N.L.R.B.* v. *Century Cement Mfg. Co.*, 2nd. Cir., 208 F. 2d. 84, 86. We conclude, therefore, that the Board's order of reinstatement

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[8] We reject the Board's finding that "while (H. D.) Lassiter was warned against drinking on the job shortly before his discharge there is no evidence that he was thereafter guilty of such misconduct", as incorrect in view of Lassiter's own testimony that he drank beer on the job "from the day I went there until the day I was discharged."

and its back pay award to H. D. Lassiter is unjustified and may not be enforced.

Finally, we agree with the Trial Examiner and the Board that the strike of July 1, 1952 was an unfair labor practice strike resulting mainly from respondents' refusal to bargain in good faith[9] and its discriminatory discharge of Walter Lassiter and Calvin Singleton, rather than an economic strike resulting from Denton's refusal to grant a wage increase or make any other particular concession not required under Section 8(d) of the Act. See 28 U.S.C.A. Sec. 158(d); *Majure* v. *N.L.R.B.*, 5th Cir., 198 F. 2d. 735, 739; *N.L.R.B.* v. *International Typographical Union*, 7th Cir., 193 F. 2d. 782, 804, cert. denied 344 U.S. 816; *N.L.R.B.* v. *Whittier Mills Co.*, 5th Cir., 111 F. 2d. 474, 478, 479. Cf. *N.L.R.B.* v. *National Paper Co., supra; N.L.R.B.* v. *Barrett Co.*, 7th Cir., 135 F. 2d. 959, 961-962. It follows that the striking employees were properly held entitled to reinstatement as of July 9, 1952, the date of their unconditional application,[10] and that the Company's refusal to grant them re-employment was in violation of Sections 8(a)(3) and (1) of the Act. *Majure* v. *N.L.R.B., supra.*

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[9] Respondents have filed a motion under Section 10(e) of the Act [29 U.S.C.A. Sec. 160(e)] to remand this case to the Board in order that it may adduce additional evidence to show that the union itself rendered the requirement of good faith bargaining impossible of compliance, but we think the Board correctly argues that respondent's motion must be denied. See e.g., N.L.R.B. v. Pool Mfg. Co., 339 U.S. 577, 579, 581-582; N.L.R.B. v. Mexia Textile Mills, Inc., 339 U.S. 563, 567.

[10] Like the Trial Examiner and the Board, we reject Denton's contention that he understood the "committee" of three employees (W. W. Singleton, T. E. Singleton and John H. Smith) who requested unconditional restatement on July 9 were speaking only for themselves, rather than for all the striking employees, as they testified Denton was informed. Since this was a conflicting factual issue which appears to have been properly resolved by the Board upon substantial evidence, we decline to disturb the Board's finding in favor of reinstatement for all striking employees here. See N.L.R.B. v. Pittsburgh Steamship Co., 337 U.S. 656, 659-660; Olin Industries, Inc. v. N.L.R.B., 5th Cir, 192 F. 2d. 799.

Section 2(a) of the Board's order will be modified so as to exclude the reinstatement and back pay award to H. D. Lassiter, and as thus modified, the order is hereby

ENFORCED.

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A True Copy:
Teste:

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Clerk of the United States Court of Appeals for the Fifth Circuit.

**Judgment**

**Extract from the Minutes of December 9, 1954**

No. 14938

NATIONAL LABOR RELATIONS BOARD,

versus

MARION G. DENTON AND VALEDIA W. DENTON
d/b/a MARDEN MANUFACTURING COMPANY

This cause came on to be heard on the petition of the National Labor Relations Board for the enforcement of an order of the National Labor Relations Board, made on October 29, 1954, "In the Matter of Marion G. Denton and Valedia W. Denton d/b/a Marden Manufacturing Company, Employer, and United Steelworkers of America, CIO, Petitioner" and "In the Matter of Marion G. Denton and Valedia W. Denton d/b/a Marden Manufacturing Company, Employer, and United Steelworkers of America, CIO, Petitioner", Case Nos. 10-RC-1807 and 10-CA-1523 respectively, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the order of the said National Labor Relations Board in this cause be, and the same is hereby, modified so as to exclude the reinstatement and back pay award to H. D. Lassiter, and as thus modified, that said order be, and it is hereby ordered enforced.

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## CITATIONS


Cases:

*Majure* v. *National Labor Relations Board*, 198 F. 2d 735 — 16

*National Labor Relations Board* v. *American National Ins. Co.*, 343 U. S. 395 — 14

*National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498 — 14

*National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, certiorari denied, 346 U. S. 887 — 14, 16

Statute:

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335475—55——1

# In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 603

MARION G. DENTON AND VALEDIA W. DENTON, d/b/a MARDEN MANUFACTURING COMPANY, PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court below (Pet., App. B, pp. 13–21) is reported at 217 F. 2d 567. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 80–131) [1] are reported at 106 N. L. R. B. 1335.

[1] The symbol "R" refers to the Transcript of Record printed as Volume I pursuant to the rules of the court below; the symbol "B. A." refers to the appendix to the brief filed by the Board in the court below.

### JURISDICTION

The decree of the court below (Pet., App. B, p. 22) was entered on December 9, 1954. The petition for a writ of certiorari was filed on February 17, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

### QUESTION PRESENTED

Whether substantial evidence on the record considered as a whole supports the National Labor Relations Board's finding that petitioners refused to bargain in good faith with the certified representatives of their employees, and thereby violated Section 8 (a) (5) of the National Labor Relations Act, as amended.[2]

### STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are set forth in Appendix A to the petition, pp. 1–2.

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[2] In their statement of the questions presented, petitioners present the additional question of whether the court below properly found substantial evidence on the record as a whole to support the Board's findings that petitioners had, in violation of the Act, discriminatorily discharged employees Walter Lassiter and Calvin Singleton. Since petitioners do not advert further to this contention in their supporting brief, it suffices to say that the decision below is, for the reasons set forth therein (Pet., App. B, pp. 15–16, 20), correct and manifestly presents no issue warranting issuance of the writ.

## STATEMENT

### I. THE BOARD'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

#### A. THE UNFAIR LABOR PRACTICES

The Board found that, in violation of Sections 8 (a) (1), (3) and (5) of the Act, petitioners (hereinafter collectively referred to as the Company) had interfered with, restrained and coerced employees in the exercise of rights guaranteed by the Act; discriminatorily discharged or refused to reinstate a number of employees because of their union activities; and refused to bargain collectively in good faith with the certified representative of their employees, the United Steel Workers of America, CIO (hereinafter referred to as the Union). The subsidiary facts on which these findings are based, insofar as they are here relevant, may be summarized as follows:

In the early part of 1952, the Union initiated an organizational campaign among the Company's employees, enlisting the active support of employees H. D. Lassiter, his two sons, Walter and David, and Calvin Singleton (R. 84, 98, 105, 107, 110; B. A. 37, 40, 42, 82, 84), all of whom were subsequently discharged (*infra,* pp. 6–7). On May 13, 1952, the Board, after an election which the Union won, certified it as the bargain-

ing representative for the Company's employees in an appropriate unit (R. 98; 16–17, 21–22).

Both before and after the election, the Company engaged in an intensive campaign of threats, promises of benefit, and interrogation of employees concerning their union activity in order to discourage the employees from supporting or joining the Union. Thus, Foreman Brewster told one employee that "if we went on and tried to get the Union in * * * it was going to shut every one of our jobs down" (R. 102; B. A. 99); he promised three employees lucrative piecework assignments if they would "pull out of the Union" or if the Union "didn't come in" (R. 101; B. A. 73, 76); and he induced two employees to attend Union meetings and to report to him on the identity of those present at these meetings and what occurred there (R. 101; B. A. 76–78, 80–81, 158–160). Similarly, about 3 weeks before the election, when H. D. Lassiter declared his support for the Union, petitioner Marion Denton remarked that he had fired Foreman Brewster's predecessor "on account of the Union, not reporting to me about the Union," adding that the Union could "affect" Lassiter and his two sons (R. 100; B. A. 84, 92). Foreman Brewster warned Lassiter that "We will all lose our jobs if the Union comes in" because Denton would "shut the shop up" (R. 101, 102; B. A. 83).

Just 3 days before the election, on May 2, Denton addressed at length a group of about 20 of the

Company's employees who were assembled in the plant shop at his instructions (R. 81, 98, 99; B. A. 38–39, 40–41, 43, 46, 151). Denton informed them that he would "never sign a contract with any union whatsoever * * * that his lawyer wouldn't, Mrs. Denton wouldn't, nor Mr. Keefer [his manager], * * * or anybody with any authority" (R. 99; B. A. 39, 43, 49, 58, 63, 65, 89, 141). He adverted to the fact that the employees of a nearby fruit packing establishment had been discharged for attending a union meeting, and had been unable to obtain reinstatement (R. 99; B. A. 39, 44, 49, 59, 63, 66), and asserted that neither the Union nor the Government could "put [the employees] back to work or pay [them] for the time [they] lost" (R. 99; B. A. 39, 44, 49, 59, 63, 66). Denton concluded by assuring the employees that they could join the Union without risk of discharge, but declared that "maybe the scale of hours would be cut if the Union got in there" and that "he had run his business his way and the Union or nobody else was not going to tell him how to run his own business" (R. 99; B. A. 55, 66, 101, 140). Following this speech, Denton told one employee that he would not sign a contract with the Union and threatened to "move his shop to Puerto Rico" before agreeing with the Union (R. 100; B. A. 96). Plant Manager Keefer reiterated Denton's determination never to sign a contract with the Union, warning that

the employees then "would have to strike and lose [their] jobs" (R. 102; B. A. 58).

The Company persisted in its anti-Union campaign after the election. Carrying out its threats of reprisals against employees who became active in the Union, the Company on May 9 discharged Walter Lassiter, an active Union member, and Calvin Singleton, another active member who had performed poll watching duties for the Union at the election (R. 105–109; B. A. 37, 40, 42, 44–46). Foreman Brewster warned again that Denton would "close the doors before he would let the Union come in" (R. 101; B. A. 77), and Plant Manager Keefer, when asked after the election whether Denton would still refuse to sign a contract with the Union, told the employees that he "knew Mr. Denton, and knew when he made a statement he usually backed up his word and he had told them all just what he would do" (B. A. 147).

Following its certification on May 13 as the exclusive representative of the Company's production and maintenance employees, the Union promptly requested the Company to meet with it for the purpose of negotiating a collective bargaining agreement (R. 81, 98; 16, 17, 21, B. A. 13, 34). On three occasions, May 27, June 4, and June 25, meetings were held between representatives of the Company, Attorney A. R. Surles and Plant Manager Keefer, who had authority to negotiate with the Union on all subjects except

wages, and representatives of the Union, International Representatives E. V. Riffe and W. B. Gravatt, and Representative W. V. VanOver (R. 114, 115; B. A. 19, 22). Denton himself refused to meet with the Union representatives at any time (R. 117; B. A. 13, 20, 24–25). Although H. D. Lassiter had been designated by the employees to assist at the negotiations, Surles refused to admit him on the ground that he had been discharged on May 23 and had thereby lost his status as an employee (R. 116; B. A. 21, 22, 87, 92).[3]

At the first meeting, on May 28, which was brief and inconclusive, Union International Representative Riffe read the Union's proposed contract terms, but Surles repeatedly stated that he could not agree to these terms without consulting Denton (R. 114; B. A. 19–20). In answer to Riffe's request for the reinstatement of the Lassiters and Calvin Singleton (see *supra,* p. 6), Surles declared that the Company had no intention to grant this request, and that it would take a Board order to obtain their reinstatement (R. 86; B. A. 20–21).

The two subsequent meetings in June produced agreement on virtually none of the Union's pro-

[3] The Board found that H. D. Lassiter, like his son Walter (*supra,* p. 6), had been discriminatorily discharged because of his union activity (R. 83–86). The court below, however, disagreed with this finding (Pet. App. B, pp. 15–16, 18–20).

posals. The Company did consent to recognize the Union as the exclusive bargaining representative of the employees in the unit determined in the Board's Decision and Direction of Election (R. 114; B. A. 23, 26–27, 107, 123). It also agreed to a basic 40-hour work week, with time and one-half overtime for hourly paid employees, but rejected this arrangement for piece-work employees (R. 115; B. A. 107–108, 123–124). Finally, the Company agreed to be responsible for the safety and health of the employees while they worked; to post a seniority list, although it did not agree as to how the list should be compiled, insisting on separate provisions for piece-work and hourly paid employees; to give limited time off for Union meetings; and to give the Union bulletin board space within the plant, if the Company could censor the material to be posted (R. 114–115; B. A. 25, 107, 108, 123–125).

On various other matters, notwithstanding the efforts of the Union negotiators to compromise their differences, no agreement was reached. Thus, the Union offered to accept a 30-day probation period, during which new employees could be discharged without recourse to the grievance procedure, but the Company demanded 90 days to 6 months, asserting that such a long period was necessary for training purposes (R. 115; B. A. 28, 29, 109). One of the Union negotiators indicated that a 90-day *training* period might be acceptable. Thereafter, Surles insisted that the

Union had agreed to a 90-day *probation* period. The parties, in any event, were unable to agree on any probation clause (R. 115, 116; B. A. 28, 29, 114, 126, 131–132). Similarly, when the Company refused to sign a contract containing a union-shop clause on the ground that the laws of the State of Florida prohibited such agreements, the Union negotiators offered to waive this clause and asked what kind of union-security agreement the Company would be willing to grant (R. 115; B. A. 23, 127). Attorney Surles replied merely that he would have to discuss the matter with Denton (R. 115; B. A. 23, 127).

The Company's negotiators rejected outright all of the other proposals made by the Union. Thus, in accordance with Denton's admitted instructions to the Company negotiators not to consider the granting of any wage increase, Surles rejected the Union's wage demands, stating that Denton had declared that he would not grant "any increase whatsoever" to the employees (R. 116–117; B. A. 23–24, 153). Surles also rejected the Union's offer to have the Company's books inspected by a certified public accountant so that, if it were ascertained that the Company was unable to grant any increase, the Union negotiators could explain this to the employees (R. 116–117; B. A. 24). Surles declared, as he had repeatedly stated throughout the negotiations, that the Company was not going to grant an increase "because of the world situation" (R.

116–117; B. A. 24, 27–28, 131). In similar manner, the Company negotiators refused to consider a clause exonerating the Union from liability for acts of individuals, insisting that the Union be fully liable for such acts and undertake a no-strike obligation (R. 115; B. A. 26, 125). Regarding the Union's proposed grievance procedure, Attorney Surles declared that under no circumstances would Denton meet with any international representative of the Union, and that, accordingly, the Company could not accept a grievance procedure in which such Union officials would participate (R. 115, 117; B. A. 24–25; 108, 124–125). The Company also rejected the Union's proposal for a check-off of union dues (R. 115; B. A. 23, 27, 108) and refused to consider paid holidays or vacations (R. 115; B. A. 26, 108).[4]

Thereafter, at the Union meeting on June 30, Union Representative Riffe reported on the progress of the negotiations, after which the employees voted unanimously to go on strike (R. 86, 118, 119; B. A. 30, 31, 62, 63, 66, 81, 97, 99). Riffe telephoned Surles that evening, informed

[4] Surles asserted at the hearing that the Company had agreed to give paid holidays, and that the Company's acceptance of the Union's vacation proposals was conditioned upon agreement as to the other provisions of the contract (B. A. 124). The Company did not except, however, to the Trial Examiner's finding that it had refused to make any concessions to the Union as to financial benefits requested in the contract (R. 118).

him of the strike vote, and requested one more meeting the following day. Surles refused, declaring "Well you have heard our proposal, more or less, you can take it or leave it" and that he would meet with Riffe only when he was "damn good and ready." On July 1, the employees confirmed their earlier strike vote and established a picket line at the Company premises (R. 119; B. A. 31–32). The Company issued separation notices to the strikers. On July 8 the strikers voted to return to work without a contract and selected a committee to speak to Denton and report their willingness to return (R. 121; B. A. 50–51, 54–55, 59, 64, 67–68, 103). When Denton met with the committee, however, he declared that he "would not even talk to [some of the men] let alone consider ever putting them back to work" (R. 121; B. A. 17–18, 51, 60, 67–68), and added, significantly, "I told you I wasn't going to sign no contract and it still stands" (R. 121; B. A. 60–61, 68).

### B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the entire record the Board found that petitioners, in violation of the Act, had (1) interfered with, restrained and coerced employees in the exercise of rights guaranteed by the Act through threats of reprisals and promises of benefits, (2) discriminatorily discharged employees Walter Lassiter and Calvin L. Singleton because of their union activity, (3) discriminatorily dis-

charged and refused to reinstate the striking employees,[6] and (4) refused to bargain collectively in good faith with the Union (R. 80, 83–87). In finding that the Company had failed to discharge its statutory obligation to bargain collectively, the Board rejected a possible implication in the Trial Examiner's report that the Company's failure to make concessions to the Union with respect to wages or financial benefits was "*per se* a refusal to bargain," rather than only "a material factor," to be taken into account together with the surrounding circumstances "in assessing [the Company's] good faith" in the negotiations (R. 86).

The Board's order directs the Company to cease and desist from the unfair labor practices found, reinstate with back pay the employees discriminated against, and, upon request, bargain collectively with the Union (R. 88–93).

### II. THE DECISION OF THE COURT BELOW

The court below enforced the Board's order with one modification not relevant here (Pet.,

[6] The complaint charged that the Company had also violated Section 8 (a) (3) of the Act by discharging David Lassiter on May 9, 1952 (R. 46). David Lassiter appeared as a witness before the Trial Examiner, but because he fainted and was unable to resume his testimony or to be cross-examined during the remainder of the hearing, the Trial Examiner struck his testimony and recommended dismissal of the complaint as to him (R. 104–105; B. A. 5[illegible], 118–119). The Board adopted this recommendation (R. 83). See also note 3, *supra*, p. 7.

App. B, p. 22).[6] Upholding the Board's finding that the Company had refused to bargain with the Union in good faith, and noting, *inter alia*, the Board's statement that the Company's failure to make concessions to the Union with respect to wages or financial benefits was only "a material factor" in assessing the Company's good faith and not "*per se* a refusal to bargain," the court concluded (Pet., App. B, p. 18):

> Considering the Company's attitude throughout the bargaining period against the background of the other violations found, and particularly in the light of prior statements by Denton and his supervisors both before and after the election that he "would never sign a contract with any union," we think substantial evidence supports the Board's finding that the Company had throughout engaged only in "surface negotiations," and that its mere "willingness to talk" was insufficient to comply with the good faith bargaining requirement of Section 8 (a) (5).

## ARGUMENT

The decision of the court below, upholding, as supported by substantial evidence on the record as a whole, the Board's finding that petitioners refused to bargain in good faith with the Union, presents no issue warranting review by this Court. The rule that this Court "is not the place

[6] See note 3, *supra*, p. 7.

to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way" (*National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503) has "special applicability to cases where, as here, a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case." (*National Labor Relations Board* v. *American National Ins. Co.*, 343 U. S. 395, 409–410).

The Company contends (Pet. 8–11) that the decision below in this respect erroneously took into consideration, *inter alia*, the Company's other contemporaneous unfair labor practices and its refusal to make concessions to the Union on wages or other financial benefits. The decision, it is asserted, is tantamount to a ruling that "an employer with a 'bad' labor background must agree with the union in collective bargaining * * *." The contention is insubstantial.

"The ultimate issue whether the Company conducted its bargaining negotiations in good faith involves a finding of motive or state of mind which can only be inferred from circumstantial evidence" and "from the totality of the employer's conduct." *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134, 139–140 (C. A. 1), certiorari denied, 346 U. S. 887.

Necessarily, the Company's other unfair labor practices in the instant case which immediately preceded, accompanied, and followed the negotiations with the Union—and in the course of which the Company expressed vehement opposition to the Union, engaged in reprisals and threats against the Union's supporters, and repeatedly affirmed that it would never sign a contract with the Union (*supra,* pp. 5, 6, 11)—shed light upon its "state of mind" at the bargaining table. As the court below held (Pet. App. B, pp. 17–18), it was wholly proper for the Board, in order to ascertain that "state of mind," to look not only to the Company's "attitude throughout the bargaining period" but also to its contemporaneous unfair labor practices.

Similarly, the Board legitimately took into consideration, as *some evidence* of the Company's attitude, its failure "to yield ground in any respect * * * with regard to such basic matters, as a wage increase, * * * paid holidays and vacations * * *" (R. 88, 117). Of course, as the Board and the court below pointed out (Pet., App. B, pp. 7, 17–18), the statutory obligation to bargain in good faith does not require either party to the negotiations to make any concessions. The Board in the instant case viewed the Company's failure to make any attempt to meet the Union at least part way with respect to wages or financial benefits as merely one of many factors evidencing the Company's lack of *bona fides* in

the negotiations. As has been pointed out, "if § 8 (a) (5) is to be read as imposing any substantial obligation at all," the Board may properly regard the employer's failure to make "*some* reasonable effort in *some* direction to compose his differences with the Union" as "at least some evidence of bad faith, that is of a desire not to reach an agreement with the union." *Reed & Prince, supra,* at pp. 134–135.

The cases relied on by the Company (Pet. 11), including, notably, decisions of the court below, are not in disagreement with this view. Insofar as any of them absolved the employer from the charge of having failed to bargain in good faith, the different results are attributable, not to a difference in principle, but rather to "the circumstances and the particular facts of the particular case" (*Majure* v. *National Labor Relations Board,* 198 F. 2d 735, 739 (C. A. 5)).

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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